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EXHIBIT 7
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HB 104

Issue Brief

House Bill 104 – Revise Exempt Water Rights Laws

Introduction

HB104, an act revising the ground water exemption from permitting requirements, sponsored by Rep. Kevin Furey (D-Missoula) is currently set for a hearing before the House Natural Resources Committee on January 17, 2007 at 3 pm in Capitol Room 472. The bill was requested by the Montana Department of Natural Resources and Conservation ("DNRC"). Montana Association of REALTORS® ("MAR") opposes HB104 in its present form. This issue brief provides a brief overview of the bill and an outline of concerns.

How HB104 Changes Montana Water Law

HB104 amends both Mont. Code Ann. § 85-2-113 and § 85-2-306. Under current law, outside of a controlled groundwater area, a person need not obtain a permit to appropriate groundwater prior to appropriating groundwater for beneficial use by means of a well or developed springs as long as the appropriation does not exceed 35 gallons per minute ("gpm") and 10 acre-feet per year. Additionally, no permit is required if the combined appropriation from two or more wells or developed springs from the same source does not exceed 35 gpm and 10 acre-feet per year.¹ An appropriator need only file a notice of completion with DNRC within 60 days of completing the well or developed spring and beginning to appropriate groundwater for beneficial use.² Upon receipt of a correct and complete notice of completion, DNRC must issue a certificate of water right.³

HB104 would significantly alter the criteria for exempt groundwater wells. Rather than exempting any well or developed spring appropriating less than 35 gpm and up to 10 acre-feet per year, HB104 would limit the exemption to:

1. wells or developed springs appropriating 35 gpm or less and up to 10 acre-feet per year for stock water on a parcel of land 40 acres or larger⁴; and
2. wells for domestic or commercial use appropriating 35 gpm or less and up to 1 acre-foot per year. Any such domestic or commercial use cannot irrigate more than one-quarter acre of lawn or garden.⁵

¹ See, Mont. Code Ann. § 85-2-306 (3)(a).

² See, Mont. Code Ann. § 85-2-306 (3)(b)(i).

³ See, Mont. Code Ann. § 85-2-306 (3)(b)(ii).

⁴ See, HB104 at p. 2, ln. 30 through p. 3, ln. 2.

⁵ See HB104 at p. 3, lns. 3-5.

A combined appropriation is exempt only if the two or more wells or developed springs for stock water do not exceed 35 gpm and 10 acre-feet per year and if two or more wells for domestic or commercial use do not exceed 35 gpm and 1 acre-foot per year.⁶ In essence, HB104 limits exempt groundwater appropriation to only stock water and domestic or commercial use, limits the place of use, and significantly reduces the allowable appropriation for domestic or commercial purposes to 1 acre-foot per year.

MAR Concerns with HB104

- **EQC found that any changes to the exemption for domestic wells “should be done with caution because it would affect many people and could have an impact on commercial and residential development in Montana.”⁷** The Surface Water/Ground Water Work Group, which included such stakeholders as Montana Rural Water Users Association, Montana Stockgrowers Association, Montana Farm Bureau, Montana Water Resources Association, private water law attorneys, the Montana Department of Environmental Quality, DNRC, county government and planning officials, environmental groups, and MAR⁸, were unable to reach an agreement on a proposal on the domestic well exemption to submit to the EQC study subcommittee.⁹ Despite the fact that caution is recommended in any change to the exempt well statute and that the stakeholders have been unable to reach consensus, DNRC has decided to push ahead with change anyway.
- **DNRC has yet to undertake a comprehensive study of exactly what, if any, adverse impact exempt groundwater appropriation has on existing water rights, nor has DNRC even undertaken such a study in areas of high development such as the Flathead or Gallatin County.** If caution is recommended in proceeding with any change to exempt wells, such a study is in order. If the intent is to protect senior surface water rights from impacts caused by exempt wells, DNRC should know whether the senior surface water rights need protecting in the first place. In fact, an independent analysis of snowpack, precipitation, well, stream flow, and groundwater level data from the Gallatin Valley found extremely negligible impact from exempt wells on groundwater levels. In fact, the maximum conceivable impact from exempt wells in the Gallatin Valley is consumption of 0.01 percent of the annual volume of water entering the Valley, which amount of use is far below detectable levels for purposes of stream-flow measurement accuracy.¹⁰ In short, there was no evidence of any detectable impacts, either adverse or positive, from wells in the Gallatin Valley during the last 70+ years.
- **What little analysis DNRC has done to support its proposal advanced by HB104 severely overstates the perceived “problem.”** DNRC significantly overestimates the size of the cone of depression that results from exempt wells, portraying a cone of depression that would exist from a well with an average daily flow rate of over 1,000 gallons per minute, far in excess of what any exempt well pumps.¹¹
- HB104 purports to get at the root of the “problem” of an assumed adverse impact on senior appropriators. But did you know, for example, that according to U.S. Geological Survey

⁶ See, HB104, p. 3, Ins. 6-8.

⁷ Legis. Envtl. Policy Off., Water Policy in Montana, Mont. Envtl. Quality Council, 60th Legis., 12 (Oct. 2006).

⁸ See, *Id.* at 21.

⁹ See, *Id.* at 26.

¹⁰ Nicklin Earth & Water, Inc., Gallatin Valley Water Resources Evaluation, 20 (January 2007).

¹¹ *Id.* at 31 & Fig. 24.

analysis, each year in the Gallatin Valley, consumption from exempt wells equates to only approximate 3 to 9 percent of the total consumption by cottonwoods and willows in the Valley?¹² Even if any adverse impact on senior appropriators resulting from decreased groundwater levels could be demonstrated, naturally thirsty trees use exponentially more groundwater than exempt well irrigation could and, consequently, would be a significantly larger contributing factor to any impacts on senior appropriators.

- **HB104 would apply a uniform approach to all watersheds, which is grossly inappropriate. The populations, growth rates, water use, precipitation and stream flow data, and other relevant factors differ radically across Montana.** A uniform approach is simply impractical and unworkable. HB104 extrapolates the perceived, and unsubstantiated, problems of high-growth areas such as the Gallatin Valley and imposes the same “solution” on all other watersheds, including more rural watersheds that are actually losing population and seeing a decrease in exempt wells.
- **An analysis of irrigation and exempt well data in the Gallatin Valley over the last 50+ years found that as land is converted from irrigated acreage to subdivision development, water use actually decreases, resulting in a net increase of water left in the system.** If every single one of the approximately 11,300 exempt wells in Gallatin County irrigated one-quarter acre with a net consumption of 1.23 acre-feet per well (an extreme “worst case” scenario), that results in a total consumption of a little over 2,700 acre-feet annually.¹³ While DNRC assumes that exempt wells will consume water, DNRC does not consider the reduction in consumption that results when an acre of irrigated land is converted to domestic use.¹⁴ As the above figures demonstrate, the difference can be significant and result in less total use of groundwater when agricultural irrigation is converted into domestic irrigation.
- **HB104 will in effect control land use through water policy, an inappropriate and perhaps unintended consequence.** HB104 would limit exempt groundwater appropriation to large livestock properties and small residential properties. DNRC claims that “[t]he majority households consumptively use less than 1 AF [acre-foot] per year anyway.”¹⁵ If that statement is true, HB104’s limitation of 1 acre-foot per year on domestic or commercial use would seem unnecessary. If DNRC wants to prevent alleged adverse impacts on senior surface water users, limiting domestic or commercial use to a level that the majority of households are at already would seem to offer very little additional protection. What the proposed limitation would actually do is stop development of homes on larger lots and potentially attack commercial development.
- **Because HB104 limits lawn and garden irrigation to one-quarter of an acre, it also raises some concern for weed control.** If domestic users cannot cultivate anything beyond a small yard or garden, they will have little ability to fight noxious weeds and invasive species on their property.
- **DNRC recently rejected the Gallatin County Commission’s petition for rulemaking on combined appropriations of exempt groundwater based, in part, on DNRC’s concern that the proposed rule would be too expensive to implement, would require**

¹² *Id.* at 22.

¹³ *Id.* at 22.

¹⁴ *Id.* at 31-32 & Fig. 25.

¹⁵ DNRC information sheet, “2007 Session Water Legislation,” 2 (Nov. 6, 2006).

unfeasible budget and personnel increases, and would bring permit application processing to a halt.¹⁶ If DNRC is truly concerned that increased permitting requirements would impose an unbearable burden on its budget and personnel and would grind to a halt the already cumbersome permitting process, the reduction in exempt groundwater wells that HB104 proposes would only add to DNRC's burden and further delay the permitting process.

- **When considered in conjunction with HB138, HB104 has the effect of making domestic and commercial wells that use less than 1 acre-foot of water go through the cumbersome and expensive process of permitting, including preparing and submitting an augmentation plan.** This not only slows down an already bogged down process, but also increases development costs for all housing, from the multi-million dollar homes on large lots to the affordable housing developments much needed in high-growth areas.

¹⁶ In re Gallatin County Pet. for Rulemaking, Order of Denial at 2, 3-5 (DNRC Dec. 22, 2006).